Filed 5/22/19 In re M.H. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.H., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. E.F., Defendant and Appellant.	E071945 (Super.Ct.No. RIJ1800147) OPINION

APPEAL from the Superior Court of Riverside County. Walter H. Kubelun, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Conditionally reversed with directions.

Christine E. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman and Prabhath Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant E.F. (Mother) appeals from the termination of her parental rights over her daughter, M.H. Because no adequate notices pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) were provided to the relevant tribes, we conditionally reverse and remand for ICWA compliance.

I.

On June 23, 2017, the Orange County Social Services Agency (SSA) filed a petition pursuant to Welfare and Institutions Code[1] section 300, subdivisions (b)(1) and (g) to declare M.H. a dependent of the juvenile court.[2] The petition indicated that M.H. may have Indian ancestry.[3]

At the detention hearing held three days later, the Orange County Juvenile Court removed M.H. from her parents' custody, authorized supervised visitation, and ordered that reunification services be provided. During the hearing, the court asked M.H.'s parents whether they had Indian heritage in their families. Mother stated she did and that it was likely Choctaw, but Mother did not know whether she or anyone else in her family

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

[2] The petition sought to declare M.H.'s older half sister a dependent of the juvenile court for the same reasons, but M.H. is the only minor involved in this appeal.

[3] Because ICWA uses the term "Indian," for consistency, we do the same.

was enrolled in the tribe. M.H.'s father (Father), who is not a party to this appeal, stated that his own father (Paternal Grandfather) is an enrolled member of the Choctaw tribe, but that he himself was not. Father did not indicate whether his mother (Paternal Grandmother) was Choctaw. The court ordered the SSA to investigate M.H.'s potential Indian heritage and provide notice to the appropriate tribes.

At the jurisdictional hearing held on July 26, 2017, the court found the allegations in the petition true. At the disposition hearing held the following month, the court declared M.H. a dependent of the court and vested custody over M.H. with the Social Services Director.

In February 2018, the court found that Mother resided in Riverside County and ordered the matter transferred there. (Father had been residing in Texas since the petition was filed.) At the transfer-in hearing held the following month, the Riverside County Juvenile Court found that ICWA did not apply.[4]

In September 2018, at the 12-month review hearing, the court determined that Father made "minimal" progress, and Mother "none," "toward alleviating or mitigating the causes necessitating placement." The court accordingly terminated reunification services. It also found again that ICWA did not apply. A Status Review Report filed by

[4] In this opinion, we use the term "juvenile court" (or simply "court") to refer to either the Orange County Juvenile Court or Riverside County Juvenile Court, depending on the context.

the plaintiff and respondent Riverside County Department of Public Social Services (Department) stated the following regarding Indian ancestry: "On June 1, 2018, I spoke with the mother . . . and she denied Native American ancestry. On May 1, 2018, I spoke with the father . . . and he denied Native American ancestry."[5]

In January 2019, at the section 366.26 hearing, the court terminated Mother's and Father's parental rights to M.H. A report filed for the hearing contained a similar statement regarding Indian ancestry: "On November 30, 2018, I spoke with the mother . . . and she denied Native American ancestry. I last spoke with the father . . . on May 1, 2018, and he denied Native American ancestry."

II.

Mother appeals from the termination of her parental rights over M.H. Her sole contention on appeal is that the Choctaw tribes were not provided with proper ICWA notice.[6] We agree.

A.

ICWA provides that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the

[5] It is not clear who the "I" specifically refers to. The report was signed by two individuals from the Department.

[6] The court's order terminating Mother's parental rights did not specifically mention ICWA, but the order was "necessarily premised on a current finding by the juvenile court that it had no reason to know [M.H.] was an Indian child and thus ICWA notice was not required." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 10, italics omitted.)

. . . termination of parental rights to . . . an Indian child shall notify . . . the Indian child's tribe . . . of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) "This notice requirement, which is also codified in California law [citation], enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 5.)

The notice requirement is a "key component" of ICWA. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) This is in part because a tribe's determination of whether a child is an Indian child is conclusive. (§ 224.2, subd. (h); former § 224.3, subd. (e)(1); 25 C.F.R. § 23.108(b) ["The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe."].) As well, "'[t]he tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending.'" (*In re D.C.* (2015) 243 Cal.App.4th 41, 60.)

Federal regulations require that ICWA notices include, "[i]f known, the names, birthdates, birthplaces, and Tribal enrollment information" of parents and "other direct lineal ancestors of the child, such as grandparents." (25 C.F.R. § 23.111(d)(2)-(3).) The Welfare and Institutions Code provisions applying ICWA contain similar requirements. Although those provisions were amended while this proceeding was pending, they at all relevant times required that an ICWA notice contain "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians,

including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known." (§ 224.3, subd. (a)(5)(C); see former § 224.2, subd. (a)(5)(C).)

"[V]igilance in ensuring strict compliance with federal ICWA notice requirements is necessary because a violation renders the dependency proceedings, including an adoption following termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child." (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 653; see 25 U.S.C. § 1914.) "'To maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.'" (*In re D.C.*, *supra*, 243 Cal.App.4th at p. 63.) As a result, failure to comply with federal requirements is ordinarily prejudicial error. (*In re Breanna S.*, *supra*, at p. 653; see *In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1424 ["Courts have consistently held failure to provide the required notice requires remand unless the tribe has participated in the proceedings or expressly indicated they have no interest in the proceedings"]; see also *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 [finding error harmless where facts provided "no basis to believe that providing" a parent's correct birth year "would have produced different results concerning the minor's Indian heritage"].)

ICWA provides that a state may provide "a higher standard of protection to the rights of the parent" than the rights provided under ICWA. (25 U.S.C. § 1921.) A court

must apply the higher standard whenever it applies. (*Ibid.*; see § 224, subd. (d).) A violation of any "higher state standard, above and beyond what the ICWA itself requires," however, "must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.)

B.

On June 26, 2017, the date of the detention hearing, Mother and Father each filed a Form ICWA-020 (Parental Notification of Indian Status) with the court. Mother's Form ICWA-020 indicated that she may have Choctaw ancestry in Texas. Father's Form ICWA-020 had a check in the box next to the statement "One or more of my parents, grandparents, or other lineal ancestors is or was a member of a federally recognized tribe." Underneath, Father wrote "[W. H.] JR. (Grandfather)." Thus, Father provided the name of a male ancestor (either M.H.'s grandfather or Father's—the response is ambiguous) as a member or former member of the tribe. Father did not indicate whether Paternal Grandmother was Choctaw. And both Mother and Father orally indicated at the detention hearing that they each have Choctaw heritage.

On July 26, 2017, the date of the jurisdiction hearing, the SSA filed a Form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) (ICWA Notice) and a Jurisdiction/Disposition Report. The ICWA Notice was dated July 11 and sent to three Choctaw tribes on July 12.

The ICWA Notice listed the name and date of birth for Mother's mother (Maternal Grandmother) but provided no information about Mother's father (Maternal Grandfather). The Jurisdiction/Disposition Report, however, listed Maternal Grandfather's name and date of birth and stated that representatives from the SSA had gathered Mother's social history on June 30, 2017, before the ICWA Notice was prepared. Thus, although Mother had already provided Maternal Grandfather's name and date of birth, the SSA did not include the information on the ICWA Notice, providing the response "Does not apply" in those fields instead.

The ICWA Notice was also deficient with respect to Father's heritage. The ICWA Notice provided no details whatsoever about Father's family other than listing Paternal Grandmother as Choctaw. The Jurisdiction/Disposition Report, however, listed the names and dates of birth of both Paternal Grandmother and Paternal Grandfather, identifying W.H. Jr. as Paternal Grandfather, and stated that SSA representatives had gathered Father's social history on July 6, 2017, five days before the ICWA Notice was prepared. Moreover, as discussed above, Father had previously informed the court, orally and on his Form ICWA-020, that he had Choctaw heritage on his father's side. Thus, although Father (1) orally informed the court that Paternal Grandfather was an enrolled member of the Choctaw tribe, (2) listed Paternal Grandfather's name on his Form ICWA-020, (3) spoke with the SSA before the ICWA Notice was prepared, (4) provided the SSA with Paternal Grandfather's and Paternal Grandmother's names and dates of birth, and (5) never indicated that Paternal Grandmother was Choctaw, the ICWA Notice (a)

listed "unknown – not provided" for Paternal Grandmother's name and date of birth, (b) listed "unknown – not provided" for Paternal Grandfather's name, date of birth, *and tribe*, and (c) indicated that Paternal *Grandmother* was Choctaw.

None of the three tribes that the ICWA Notice was sent to—the Mississippi Band of Choctaw Indians, the Jena Band of Choctaw Indians, and the Choctaw Nation of Oklahoma—concluded that M.H. or her relatives were members or eligible for membership.

C.

We find prejudicial error in the failure to comply with federal ICWA notice requirements. The ICWA Notice did not contain information the SSA possessed relating to Maternal Grandmother, Paternal Grandmother, and Paternal Grandfather, despite the federal regulations' requirement that they be provided if known. Although the tribes responded to the deficient ICWA Notice, we cannot say that their responses would have been different had the required information been provided. (See *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 654 ["Although the Pascua Yaqui tribe responded that the children were not members of, or eligible for membership in, the tribe, the tribe's letter explained its assessment was '[b]ased upon the family information provided.' Some of the omitted information pertained directly to the maternal great-grandmother, the ancestor . . . affirmatively identified as a Yaqui Indian. We cannot say with any degree of confidence that additional information concerning that relative . . . would not have altered the tribe's evaluation."].)

The analysis under the Welfare and Institutions Code is much the same. Although a violation of a "higher state standard, above and beyond what the ICWA itself requires" is harmless absent a "reasonable probability that [the appellant] would have enjoyed a more favorable result" otherwise (*In re S.B.*, *supra*, 130 Cal.App.4th at p. 1162), state law here provides no such higher standard. Both federal regulations and the Welfare and Institutions Code require that an ICWA notice contain known information concerning a child's direct lineal ancestors. (25 C.F.R. § 23.111(d)(2)-(3); § 224.3, subd. (a)(5)(C); former § 224.2, subd. (a)(5)(C).) Because the violation here runs afoul of both federal and state law, we need not ask whether there is a reasonable probability Mother would have enjoyed a more favorable result if no ICWA notice violation occurred.

D.

The Department raises several arguments in contending that no ICWA notice violation occurred. We consider each in turn.

First, the Department contends that regardless of any potential notice violation, ICWA does not apply because Mother and Father ultimately denied having any Indian ancestry. The Department relies on *In re C.A.* (2018) 24 Cal.App.5th 511, which found no ICWA error where the child's father initially "indicated that he might have Native American heritage" but subsequently "withdrew" the claim. (*Id.* at p. 519.) *In re C.A.* is inapposite; there, the father explained that he changed his response because "he had learned new information about his parents and did not have any Native American heritage." (*Ibid.*) Specifically, the father "discovered that the man he thought was his

biological father was actually not his father." (*Id.* at pp. 514-515.) Here, the record provides no indication as to why Mother and Father ultimately denied having Indian heritage. The record does not indicate that the changes in responses were due to any additional information that Mother or Father uncovered, only that they no longer claimed Indian heritage. Under these circumstances, *In re C.A.* is not applicable.

The Department asks that we presume Mother and Father reconsidered their responses after speaking with their families. The presumption is required, the Department contends, because we are to apply a substantial evidence standard of review. Not so. "[W]here the record does not show . . . that the ICWA notices that were given included all known identifying information, the burden of making an adequate record demonstrating the court's and the agency's efforts to comply with ICWA's inquiry and notice requirements must fall squarely and affirmatively on the court and the agency." (*In re N.G.* (2018) 27 Cal.App.5th 474, 484.) We therefore do not presume away any defects in the record regarding ICWA's requirements here.

Second, the Department contends that it complied with its statutory duty of inquiry pursuant to section 224.2, subdivisions (a) through (c). But the Department's duty of inquiry is distinct from ICWA's notice requirement. (Compare § 224.2, subd. (e) [duty of inquiry] and former § 224.3, subd. (c) [same under pre-2019 law] with 25 U.S.C. § 1912(a) [notice requirement], § 224.3, subd.(a) [same], and former § 224.2, subd. (a) [same under pre-2019 law].) Because we find reversible error in the Department's failure to comply with ICWA's notice provisions, whether or not the Department complied with

the inquiry provisions is beside the point. Moreover, even if the Department complied with section 224.2, subdivisions (a) through (c),[7] it failed to comply with section 224.2, subdivision (e). Subdivision (e) begins, "If the court, social worker, or probation officer has reason to believe than an Indian child is involved in a proceeding, the court, social worker, or probation officer shall make further inquiry regarding the possible Indian status of the child . . . ." The provision goes on to state that further inquiry includes "[i]nterviewing the . . . extended family members" to gather additional information as well as "contacting . . . any other person that may reasonably be expected to have

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[7] Section 224.2, subdivisions (a) through (c) provide as follows:

"(a) The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 may be or has been filed, is or may be an Indian child. The duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child.

"(b) If a child is placed into the temporary custody of a county welfare department pursuant to Section 306 or county probation department pursuant to Section 307, the county welfare department or county probation department has a duty to inquire whether that child is an Indian child. Inquiry includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled.

"(c) At the first appearance in court of each party, the court shall ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child. The court shall instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child."

information regarding the child's membership status or eligibility." (§ 224.3, subds. (e)(1)-(2).) There is nothing in the record to suggest that the Department or the SSA ever attempted to interview or contact Paternal Grandfather, whom Father had identified as an enrolled member of the Choctaw tribe. The Department therefore failed its duty of inquiry as well.[8]

Finally, the Department argues that the juvenile court properly found that ICWA does not apply because there is no reason to know M.H. is an Indian child under current law.

Although the notice requirement has always been triggered by a court having "reason to know" a child may be an Indian child, for many years the term was undefined under federal law. (See *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 650.)[9] It was not

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[8] The failure to contact and interview extended family members did not stop with Paternal Grandfather. For instance, the record does not indicate that any effort was made to contact Maternal Grandfather, nor does it show that Mother's Indian ancestry was limited to her mother's side.

[9] Our courts, following nonbinding federal guidelines, interpreted "reason to know" as "reason to believe." (See *In re Joseph P.* (2006) 140 Cal.App.4th 1524, 1529-1530; Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979) [guidelines were "not published as regulations because they [were] not intended to have binding legislative effect"].)

until 2016 that the Department of the Interior promulgated regulations defining "'reason to know.'" (Indian Child Welfare Act Proceedings, 81 Fed.Reg. 38778-38776, 38803.)[10]

State law, however, defined "reason to know" in 2006. (Senate Bill No. 678 (2005-2006 Reg. Sess.) § 32; former § 224.3, subd. (b).) From 2006 until 2018, when Assembly Bill No. 3176 (2017-2018 Reg. Sess.) ("AB 3176") amended the definition, a court or agency had "reason to know" a child may be an Indian child if, for instance, a "person having an interest in the child . . . provide[d] information *suggesting* the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (Former § 224.3, subd. (b)(1), italics added.) As cases at the time noted, the former provision did not demand much before requiring ICWA notice. (See *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 268 [mere "minimal showing required to trigger the statutory notice provisions"].) But now, as amended by AB 3176 (which became effective on January 1, 2019), the Welfare and Institutions Code's definition of

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[10] Under the federal regulations, there is "reason to know" a child is an Indian child if "(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child; [¶] (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child; [¶] (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child; [¶] (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village; [¶] (5) The court is informed that the child is or has been a ward of a Tribal court; or [¶] (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe." (25 C.F.R. § 23.107(c).)

"reason to know" conforms to the definition provided by federal regulations. (§ 224.2, subd. (d); see Assem. Com. on Human Services, Analysis of Assem. Bill No. 3176 (2017-2018 Reg. Sess.) August 28, 2018, p. 8 [the bill "simply seeks to change California law to comply with Federal regulations"].)

The Department contends that there is no "reason to know" that M.H. is an Indian child under the Welfare and Institutions Code as amended by AB 3176 or federal regulations. Whether or not this is true, it is beside the point. The notice provisions were triggered at the 2017 detention hearing when Mother and Father each indicated they have Indian ancestry and Father stated that Paternal Grandfather was a member of the Choctaw tribe. The latter is "information suggesting . . . one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (Former § 224.3, subd. (b)(1).) The Department does not point us to any indication, nor does our own research reveal any, that the revised definition of "reason to know" was intended to apply retroactively. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844 ["[A] statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."].) Accordingly, whether there is "reason to know" under the current, more restrictive definition is irrelevant; the Department had reason to know M.H. may be an Indian child under state law in effect at the time of the detention hearing, thus triggering the notice provisions under federal and state law.

III.

The orders terminating parental rights are conditionally reversed and the matter is remanded for the limited purpose of complying with ICWA. If, after further inquiry and notice by the Department, including further notice to the three tribes previously contacted, the juvenile court determines that the tribes were properly noticed and there either was no response or the tribes determined that M.H. is not an Indian child, the orders shall be reinstated. However, if a tribe determines M.H. is an Indian child as defined by ICWA and the court determines ICWA applies to this case, the juvenile court is ordered to conduct a new hearing pursuant to section 366.26 and proceed in accordance with ICWA, including considering any petition filed to invalidate prior orders. (25 U.S.C. § 1914; § 224, subd. (e).)

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RAPHAEL
J.

We concur:

MCKINSTER
P. J.

MILLER
J.